DAMAGES FOR BREACH OF CHARTERPARTY.

The June 1917 parts of the Law Reports contain the decision of the House of Lords in the case of *Watts, Watts & Co.* v. *Mitsui & Co.*,[1] which involved an interesting question regarding the damages that charterers were entitled to recover from shipowners for failing to send a steamer to carry a cargo in accordance with the charterparty. By the charterparty, which was dated the 5th of June 1914, the shipowners agreed that a steamer, the name of which was to be declared at least 21 days before the expected date of readiness, should proceed to Marioupol, in the sea of Azof, and there load a cargo of 3500 tons of sulphate of ammonia, and carry it via the Suez Canal to a port in Japan and there deliver the same on being paid freight at the rate of 20s. a ton. The loading time was not to commence before September 1st, except by consent, and the charterers had the option of cancelling the charter if the steamer was not ready by the 20th of September, and the charterparty contained the exception of arrests and restraints of princes, rulers, and peoples.

The shipowners on the 1st of September, being asked by the charterers to declare the name of the steamer, replied that the charterparty must be considered as cancelled owing to the war, adding that the British government had prohibited steamers from going into the Black Sea to load. In fact there had been no such prohibition. Turkey did not enter into the war till November, but the Dardanelles was closed by the Turkish government on the 26th of September.

The charterers in April 1914 had contracted with the Coppee Company in Russia for the purchase of 3500 tons of sulphate of ammonia, and, as the steamer was not sent and no other steamer could be procured, they did not accept delivery of the goods and finally settled with the Coppee Company by paying £4500 as a compromise in arbitration proceedings. They claimed against the shipowners as damages this £4500 and also the enhanced value of the sulphate of ammonia in Japan at the time when it would have been delivered there in the ordinary course.

It was held at the trial and on appeal that, although there was a reasonable apprehension that the Dardanelles might be closed, the apprehension did not constitute a restraint of princes or

[1] [1917] A. C. 227.

peoples, and did not justify the shipowners in not sending the steamer to load. It was conceded that, if the steamer had arrived at Marioupol by the 20th of September, it would have taken eight days to load her, and, by the time she arrived at the Dardanelles, the strait would have been closed for several days. But it was shown that, if the cargo had been loaded, the venture was insurable and would naturally have been insured for a sum equal to the value of the cargo on arrival in Japan, and it was held that the damages must be estimated on that basis.

At the trial the judge found that, if the sulphate of ammonia had been carried to Japan, the charterers would have sold it on the market for £3800 above the purchase price and the cost of transport and insurance, and he gave judgment for that sum, but he rejected the additional claim for £4500 paid to the Coppee Company on the ground that the damages were too remote.[2]

Both parties appealed, and the Court of Appeal agreed that the sum of £4500 paid as damages could not be an item in the calculation of damages, but decided that the shipowners had nothing to do with the particular contract to purchase into which the charterers had entered, and that the proper measure of damages, according to the rule stated by Lord Davey in *Ströms Bruks Aktie Bolag* v. *Hutchison,*[3] was the cost of replacing the goods in Japan at the time when they ought to have arrived, less the value of the goods at Marioupol and the freight and insurance, including the insurance against war risks. And they directed a computation according to that rule.[4]

The shipowners appealed from this decision, and the House of Lords, while affirming the decision in other respects, decided that the judge at the trial had adopted the proper measure of damages, which was the difference between the price for which the charterers had purchased the goods and the market price in Japan at the time when they would have arrived in the ordinary course, deducting the freight and cost of insurance, and that the market value at Marioupol at the time of the breach, or the sum of £4500 paid by the charterers to the Coppee Company, ought not to be considered as affecting the damages. The damages ascertained at the trial on this basis were £3800, but by an oversight the cost of insuring against war risks, which at 6 per cent.

[2]Mitsui & Co. *v.* Watts, Watts & Co. [1916] 2 K. B. 826, 831-832.

[3][1905] A. C. 515, 529.

[4]Mitsui & Co. *v.* Watts, Watts & Co., *supra,* footnote 2, at pp. 839-851.

would have amounted to £3000, had not been allowed for, and the damages were accordingly reduced to £800.

The result of this decision is that the charterers recovered as damages £800 on account of the profit that they would have made if the sulphate of ammonia had been carried to Japan and sold there for £800 above the purchase price and all their expenses. But no allowance was made to them on account of the loss they actually sustained by having the sulphate of ammonia left on their hands and being unable to dispose of it except for a price less than the purchase price. There could be no profit at all unless they got back the purchase price and something more. They did not get back the purchase price and the sum awarded as damages was only what would have been the profit if they had got it back and that sum besides. As they did not get back the purchase price, the sum awarded as damages was very far from representing the profit that would have resulted if the goods had been carried to Japan. In fact they lost £4500 in disposing of the sulphate of ammonia and there was no evidence that they could have got rid of it on any better terms. They would have suffered this loss, even if the market in Japan had been such that there would have been no profit and the only benefit to be derived from carrying the goods there would have been to escape the loss that was certain if they were disposed of at Marioupol.

The actual loss sustained by the charterers was the difference between the value of the goods in Japan and what they could get for them at Marioupol, deducting the cost of carriage to Japan and the insurance. It is difficult to understand how the loss could be in any way affected by the price that the charterers had agreed to pay five months before. That price would affect the profit that they would have made if they had got the goods to Japan, but the loss arising from the breach of the shipowners' contract to carry them there might be much more, or much less, than that profit. The value at Marioupol at the time of the breach of contract might have been more than the purchase price, or even than the value in Japan, and then there would have been no loss at all or the loss would have been less than the expected profit. In such a case, if the charterers were allowed to recover as damages the difference between the purchase price and the value in Japan, less the expenses, they would be placed in a much better situation than if the contract had been performed. On the other hand, if the value at Marioupol at the time of the breach was less than

the purchase price, the damages would be increased in exact proportion to the fall in value. Consequently it is not apparent how the purchase price in any such case can have anything to do with the loss occasioned by the breach of contract, except so far as the price may be evidence of the value at the time of the breach.

The general rules for assessing damages for breach of contract seem not to have been in question. Lord Dunedin quoted[5] the statement of Parke, *B.* in *Robinson* v. *Harman*,[6] as follows,

> "Where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed."

The discussion of the subject in *Hadley* v. *Baxendale*,[7] was also referred to, in which the rule laid down was that the damages should be such as may fairly and reasonably be considered as arising naturally, *i. e.*, according to the ordinary course of things, from the breach of contract, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. It was considered that in the ordinary course of business a sensible man would naturally have insured against war risks and that the damages must be assessed on the assumption that such insurance would have been effected. The breach of charterparty thus deprived the charterers of the opportunity of dispatching the cargo insured against war risks and of recovering on the policy for the actual or constructive total loss that would certainly have occurred. This eliminated the effects of the war from the case and brought it within the ordinary rules of damages.

It therefore became necessary to ascertain what damages would place the charterers in the same situation as if the contract had been performed. The amount of profit that would have resulted from selling the goods at their market value in Japan was satisfactorily ascertained to be £800 and it was held that the charterers were entitled to recover that sum. But the goods actually remained in their control and were worth, not what they had agreed to pay for them, but only what they could get for them at Marioupol. They actually lost £4500 in disposing of the goods there, and this loss arose as directly from the breach of contract as the loss of

[5] *Supra*, footnote 1, at p. 241.
[6] (1848) 1 Exch. 850, 855.
[7] (1854) 9 Exch. 341, 354.

the expected profit. These two sums of £800 and £4500 together represent the difference between the value of the goods in Japan and their value at Marioupol. This had been laid down as the proper measure of damages in a somewhat similar case in the House of Lords twelve years before.

In *Ströms Bruks Aktie Bolag* v. *Hutchison*,[8] shipowners had agreed with the charterers to carry 500 tons of wood-pulp from Sweden to Cardiff, the shipment to be made in August or September and the shipowners to give six days notice of readiness. The charterers were manufacturers of wood-pulp in Sweden and had contracted with a firm at Cardiff to sell and deliver to them there a like quantity of wood-pulp to be shipped from Sweden at the same time as that specified in the charterparty. The shipowners entirely failed to perform their contract, and, when the charterers had notice that they would not be ready to do so, it was not possible to obtain another vessel to take the goods. In these circumstances the purchasers bought in against the charterers, and, as there was no market for wood-pulp at Cardiff, they were obliged to purchase in Manchester, Liverpool, and London, and to pay in addition the cost of carriage. It was not disputed that they acted reasonably and that the pulp could not have been bought at less cost. The charterers having been called on by them to pay the additional cost paid the amount of the claim and claimed over against the shipowners. Lord Davey said[9] that he was of the opinion "that the proper measure of damages would have been the cost of replacing the goods at their place of destination at the time when they ought to have arrived, less the value of the goods in Sweden and the amount of the freight and insurance." He also said that the actual purchases might properly be taken as evidence of the cost of replacing the goods in Cardiff, and that there was evidence upon which it might justly have been found that the value in Sweden would not exceed the price in the contract with the purchasers. Lord Macnaghten intimated that the value there might have been less and the damages increased accordingly, for he said[10] that the charterers "do not even make any claim for the warehousing and insurance of the goods left on their hands, or *for diminution in the value* of those goods by reason of the subsequent fall in the market." The charterers accordingly had judgment for the amount of their claim.

[8] *Supra*, footnote 3.
[9] At p. 529.
[10] At p. 525. The italics are the author's.

If the rule of damages laid down in this case had been applied in the *Watts & Co. Case* the result would have been entirely different from what it was. The damages would have been the market price when the goods ought to have arrived in Japan less their value at Marioupol and the freight and insurance. It is stated in the opinion of the Lord Chancellor:[11] "There was no evidence that there was any market at Marioupol for such goods". But it was an undisputed fact that the charterers paid the Coppee Company £4500 by way of compensation upon their abandoning the purchase. The effect of this transaction was exactly the same as if the charterers had accepted the goods and paid the whole price and had then resold them to the Coppee Company and received back as the price on the resale £4500 less than they had just paid.[12] It was not disputed that the charterers acted reasonably, or as sensible men of business would have acted, in making the arrangement with the Coppee Company, and that the goods could not have been sold for a better price. In the *Ströms Bruks Case,*[13] Lord Macnaghten said that the purchases were the best evidence possible of the measure of damages resulting from the breach of contract. So it would seem that, in the absence of any market at Marioupol, the price for which the charterers got the Coppee Company to take the goods off their hands was the best evidence of their value there. If that was all that they could reasonably be expected to get for them, it furnished by a comparison with the price in Japan the exact measure of the damages incurred by them.

Although the decision of the Court of Appeal was rested on the rule laid down by Lord Davey in the *Ströms Bruks Case,* that case and the rule so laid down received only scant attention in the House of Lords. Lord Sumner said that he did not think that the canon expressed by Lord Davey was in point, and he goes on to say,[14]

> "There the charterers were themselves producers of the intended cargo, and could have loaded the ship from their own factory if she had arrived to load. Their claim arose because the shipowner's breach of contract prevented them from delivering

[11] At p. 235.

[12] *Cf.* Webb. *v.* Herne Bay Commissioners (1870) L. R. 5 Q. B. 642, at p. 654, *per* Blackburn, *J.*; Larocque *v.* Beauchemin [1897] A. C. 358, at pp. 365-366.

[13] *Supra,* footnote 3.

[14] At pp. 247-248.

> the cargo at the port of discharge, as they had contracted to do. Naturally, in measuring their loss, the cost of replacing it there was a factor to be compared with the value of an equivalent quantity never shipped at all. In the present case there is no evidence that there was any market or even any market price for sulphate of ammonia at Marioupol about September 10, 1914. There is no evidence that the charterers could have bought a cargo of it there or then so as to load it on the arrival of the defendant's ship."

But the charterers had already provided themselves with the intended cargo, and the amount of their loss depended on the price for which they could get rid of it. They had no more occasion for buying a cargo to load at Marioupol than the charterers in the *Ströms Bruks Case*. In that case nothing is said about the *price* at which the charterers could have provided a cargo, but the damages were estimated by a comparison of the *value* of the cargo at the place of shipment with the cost of replacing them at their destination. The value was what the charterers might fairly be expected to get for them in Sweden, and, upon the evidence, was taken to be the price for which the charterers had agreed to sell them to the purchasers. This was all that the charterers claimed, but, as already mentioned, Lord Macnaghten intimated that the value might have been less if they had claimed it on account of the fall in the market. If there was no market for sulphate of ammonia at Marioupol, that would only be further evidence that the arrangement with the Coppee Company was the best one open to the charterers, and was the best evidence possible of the value at Marioupol. It is not easy to understand how there came to be a discussion about the price for which the charterers might have procured a cargo at Marioupol at the time when the ship ought to have arrived. It is quite possible that, as the Coppee Company were apparently the only persons from whom the goods could be obtained, the charterers could not have obtained a cargo at Marioupol at the time of the breach for a less price than they had previously agreed to pay. But the only evidence was that they could not get any such price for the cargo already obtained, and the real question was what were the best terms upon which they could have disposed of that cargo.

The *Ströms Bruks Case* is not referred to at all by the Lord Chancellor or Earl Loreburn and it is only mentioned by Lord

Dunedin in speaking of *Rodocanachi* v. *Milburn*,[15] which he says is in consonance with it, but in which there was no similar question of damages, for the goods had been shipped and afterwards lost by the fault of the shipowner, who was held to be liable for their whole value.

The grounds upon which the decision proceeded as regards the damages are stated by the Lord Chancellor as follows:[16]

> "It is quite clear, and indeed was not disputed, that if the steamship had arrived at Marioupol the sulphate of ammonia which the respondents had contracted to purchase under the contract of April would have been the goods shipped, and this of course involved taking delivery of these goods and paying for them to the seller. If the respondents, having so shipped the goods, had started the steamship upon a voyage to Japan, insuring against war risks, the adventure would have been frustrated by the closing of the Dardanelles, and this would have constituted a constructive total loss. The respondents would have recovered on the insurance the value of the goods as at the time of their expected arrival in Japan, but they would ex hypothesi have to pay the price for the goods under the contract of April, and the difference between these two amounts would have represented their profit after deduction of premium, &c. This seems to me to exclude any inquiry as to a possible lower market value at Marioupol at the time of the breach."

The hypothesis upon which the charterers were allowed to recover anything was that, if the shipowners had not broken their contract to send the steamer, the charterers would have shipped the goods and paid the price, insured against war risks, and, when it was found that the closing of the Dardanelles made the voyage impossible, they would have abandoned the goods to the underwriters and recovered for a total loss. If they could recover upon that hypothesis the amount of the profit that they would have made, it is difficult to see why they should not also recover so much of their original investment as they actually lost in disposing of the goods. They would have recovered the whole of their original investment as well as the expected profit if the goods had been shipped and insured, and the loss in disposing of the goods would have fallen on the underwriters. There was in

[15](1886) 18 Q. B. D. 67.

[16]At p. 234.

fact no shipment or insurance by reason of the breach of contract, but the charterers had the cargo ready for shipment and were liable for the price. They were left in the situation in which the underwriters would have been with the goods on their hands. If the goods had been actually delivered, and had remained in the hands of the charterers, they ought to have recovered from the shipowners the whole amount of the supposed insurance less the value of the goods. This made it necessary to inquire as to the value at Marioupol at the time of the breach. The transaction with the Coppee Company was very good evidence of that value, for in substance it was the same as if the charterers had paid the purchase price under the contract and had then resold the goods to that company for £4500 less. The purchase price less £4500 would, in the absence of other evidence, naturally be considered as the value of the goods at Marioupol. It is highly probable that the charterers could not have made a better bargain with the Coppee Company if they had received and paid for the goods before they had any reason to believe that the shipowners would not perform their contract, and had tried to resell to that company after the breach. It seems, with submission, that the sum that ought to have been deducted from the value in Japan, in order to ascertain the damages, was not the original price of the goods, but so much of it as they were able to get back after the shipowners had broken their contract. That would have been the measure of damages if the rule laid down by Lord Davey in the *Ströms Bruks Case* had been applied, and the charterers would then have been placed in the same situation with respect to damages as if the contract had been performed.

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